United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2047 B P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NOS. 74-2047 and 74-2127

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants

BRIEF FOR APPELLANTS

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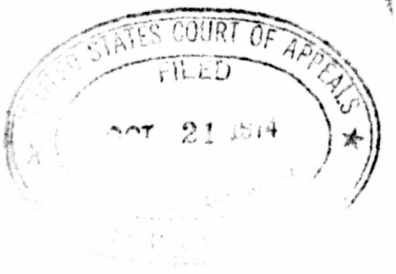

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PRELIMINARY STATEMENT

This is an appeal from judgments of conviction on charges of criminal contempt entered after a trial by jury before Griesa, J. Appellants were each sentenced to serve one year's imprisonment (App. 363). Related cases have been before this Court. Smilow v. United States, 465 F.2d 802, vacated and remanded, 409 U.S. 944, remanded by this Court, 472 F.2d 1193. Also United States v. Huss, 482 F.2d 38. The opinion by Judge Griesa denying motions for discovery (App. 158) is not reported.

QUESTIONS PRESENTED

1. Whether witnesses who have been found in civil contempt for refusing to testify during a trial may be precluded, in a subsequent action against them for criminal contempt, from asserting legal defenses based on unlawful governmental electronic surveillance for the sole reason that such defenses "were fully available . . . in the civil contempt proceedings" and were not adequately presented at that time.

2. Whether the district judge erroneously concluded from the record of the earlier "civil contempt proceedings" that the issues growing out of the prosecution's unlawful electronic surveillance and other illegal activity had been waived by the appellants.

3. Whether the district judge erred in not allowing the defendants to testify that their refusal to answer questions was based on religious grounds, in excluding all evidence relating to such conscientious convictions, and in instructing the jury that, notwithstanding defense counsel's argument, they could not consider the defendant's religious objections in any manner.

STATEMENT

Richard Huss and Jeffrey Smilow are young men who were believed by the prosecution to have evidence relevant to the bomb explosion that occurred on January 26, 1972, at the offices of Sol Hurok in New York City, at which time they were respectively 17 and 18 years old (App. 203, 230). They have not been charged as conspirators or participants in the federal indictment which named four defendants as having committed that offense. The named defendants included one Sheldon Seigel, who was, as this Court noted in a related opinion, "the focus of so much investigative attention." United States v. Huss, 482 F.2d 38, 42 (2d Cir. 1973). Appellants Huss and Smilow were called as witnesses in the federal trial growing out of the Hurok bombing after Seigel -- who the prosecution had once viewed as a cooperative informer -- refused to testify. Both Huss and Smilow refused to testify, even after a grant of immunity, on various grounds -- although the one they individually repeated most often was that it would violate their religious principles to provide testimony. The upshot of hurried litigation which took place at the time of that trial in June 1973 in the district court and in this Court was that the prosecution's efforts to force the principal

culprit, Seigel, to testify were unavailing because of the extensive pattern of "lawlessness by law enforcers" which this Court found to have existed. 482 F.2d at 52. On the technical ground that their counsel had not theretofore formally raised the same complex issues of government misconduct as had been asserted on Seigel's behalf by his attorney -- a distinguished Professor of Criminal Law at the Harvard Law School -- this Court held in June 1973 that Huss and Smilow (whose civil contempt orders had been appealed together with Seigel's) could be ordered to testify.

The district court had recessed the Hurok trial while the appeals of Seigel, Huss and Smilow from the civil contempt orders were being heard and decided. Huss and Smilow were in jail during the pendency of the appeals from the civil contempt orders (App. 289); Seigel was out on bond. Promptly upon decision by this Court of that appeal, the trial was resumed and Huss and Smilow were called. When Huss repeated that he refused to testify on religious grounds,[1/] he was advised that he would be charged with criminal contempt and was placed in custody under $50,000 cash or surety bond (Transcript of

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1/ When Huss had first been summoned to the stand his counsel had asked that he not be compelled to testify because the prosecution had "learned of Mr. Huss through illegal wiretaps and illegal pressure." (App. 48).

United States v. Cohen, et al., S.D.N.Y., 72 Crim. 778 [hereinafter "1973 Tr."], p. 264).[2/] Immediately thereafter, Smilow was called. His counsel, Robert Leighton, Esq., moved that the calling of Smilow be restrained "on the basis that his identity is tainted because of the illegalities surrounding the subject, the witness Seigel which was decided by the Circuit Court of Appeals of this Circuit" (App. 33-34). When the district judge, Bauman, J., observed that this application had not been made when Smilow was called the first time -- "before the appeal" -- counsel replied (App. 34):

> I thought that in asking for the wiretaps, or a transcript of these wiretaps was tantamount to my asking for a hearing and I thought the Court in the interests of justice would direct a hearing be held in order to see whether or not taint was involved.

In subsequent colloquy the prosecutor conceded that Smilow's relations to the matter under investigation had been discovered from Seigel, who was himself a "tainted" source (App. 35). This confirmed the point which had been made by Huss' counsel before Huss had been called to testify the first time. On that occasion, Arthur Miller, Esq., representing Huss, stated (App. 48):

2/ The bond was ultimately raised, but it constituted "an enormous burden on their families" (App. 280).

> At this time your Honor, the authority of Tane against the United States, I would like to request the Court that they refrain from calling Mr. Huss as a witness, and that the Government learned of Mr. Huss through illegal wiretaps and illegal pressure put on specifically the Jewish Defense League offices and the previous witness in this case Mr. Sheldon Seigel.

Judge Bauman on that earlier occasion had asked the prosecutor, "How about his point that you learned of his existence through illegal wiretaps?" (App. 49). The prosecutor had replied that Huss' existence had been learned from Seigel (who -- prior to this Court's opinion -- was then viewed as a "legal" source). The prosecutor continued that Huss' standing to object "would not come into being until he was held in contempt" (App. 49). On this basis, the district judge had denied counsel's objection. (App. 50).

In other colloquy that <u>followed</u> this Court's affirmance, Smilow's attorney also requested a full hearing on the wiretaps which had been placed on the Jewish Defense League offices between October 1970 and July 1971 to determine whether there was any taint (App. 36). When the prosecutor replied that this claim was "inconsistent" with the argument that Seigel was the source of Smilow's identity, Judge Bauman interrupted with the following observation (App. 37; emphasis added):

> Let me ask you this before we get into any further questioning of this man. Why isn't

> the record of his last questioning in which I informed him that he could be prosecuted for criminal contempt if he persisted, why is that record not sufficient for you to proceed on criminal contempt and let him raise those questions before any Judge who is involved in the trial of the criminal contempt.

After another exchange, Smilow was asked whether he would answer the questions and he said he would not. His attorney again asked for a hearing "to decide whether or not the wiretap in question on the JDL office did in fact have information which led to the whereabouts of Mr. Smilow and whether or not it is tainted" (App. 38-39). Judge Bauman refused to hold a hearing on the ground that "the record is sufficient to proceed against him, as I warned him the last time, for criminal contempt. . . ." He then went on to say (App. 39; emphasis added):

> Then if you want to take it up with the trial judge, whoever it may be, in his criminal contempt case, that may be the place to do it.

When Smilow thereafter continued his refusal to testify on religious grounds, he was taken into custody on $50,000 cash or surety bond bail.

On June 28, 1973, Judge Bauman signed orders to show cause which formally charged Huss and Smilow with criminal

contempt pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. The orders to show cause were based upon prosecutor's affidavits which relied on the refusals of Huss and Smilow to testify on both occasions -- June 8 and June 27, 1973 (App. 7-9, 45-47). On November 2, 1973, appellants' trial counsel (Paul C. Chevigny, Esq.) filed with the district court a motion under Rule 16 of the Federal Rules of Criminal Procedure and Sections 2510-2520 and 3504 of the Criminal Code for an order requiring the prosecution to disclose interceptions of all wire and oral communications involving the appellants and of other specified and unspecified unlawful acts (App. 101-157). Specifically, the motion requested a hearing as to whether the appellants' "identities as witnesses in United States v. Cohen and Davis were discovered as a result of illegal surveillance or that the evidence on which they were to be questioned in that case was tainted by illegal surveillance. . . ." (App. 107). In support of the motion, appellants' counsel filed a 47-page legal memorandum discussing the appellants' standing to object to wiretaps of the JDL offices and many other unlawful acts which has been disclosed during the prior proceedings.

The district judge (Griesa, J.) addressed none of these questions. He denied the requested discovery "in all

respects" in an order dated May 6, 1974 (App. 158-171). Noting that the requested information would "be relevant on the question of whether the Government obtained knowledge of defendants' identity through illegal means, and whether the proposed questioning of defendants at the criminal trial was tainted" (App. 159), Judge Griesa said that these were matters "which the defendants either raised, or should have raised, in the civil contempt proceeding before Judge Bauman and in the appeal to the Court of Appeals. . . ." (App. 166). Because, in his view, the appellants had "made their own strategic decisions" about the issues to be raised before Judge Bauman and had relied principally on "the religious objections," Judge Griesa ruled that Huss and Smilow could not, in the proceeding where their criminal guilt was being determined, "litigate this issue afresh" (App. 166, 169). Accordingly, he denied the discovery motions.

On July 17, 1974, the criminal contempt charges were tried before Judge Griesa and a jury in a joint trial.[3/] Both

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3/ There is no indication in the record or on the docket sheet as to any formal order consolidating the cases for trial. Defendants' counsel did not, however, consent to the consolidation.

defendants were found guilty and sentenced to one year's imprisonment. During the trial, Judge Griesa made it clear to defense counsel that he would not allow the jury to hear evidence regarding the defendants' religious convictions -- which were the principal reason they refused to testify. Pursuant to this ruling, the judge permitted the prosecutor, over defense objection, to excise portions of the transcript which explained the religious rules (App. 173-175), prohibited the defendants from testifying about their religious convictions which precluded testimony (App. 224-225), and told the jury in no uncertain terms that defense counsel's argument that the jury should consider the defendants' religious convictions in determining whether the contempt was willful was wrong, and that the religious objection was not proper for consideration (App. 266).

ARGUMENT

Introduction

This appeal tests whether two young men who were, under the prosecution's allegations, no more than witnesses to the events leading up to a tragic bombing in 1972 are to be the only ones to suffer because, as a result of the prosecution's lawlessness, the key figure could not be forced to testify and his co-defendants were acquitted. If these young men had been fairly and properly tried on a validly based allegation that they willfully refused an order to testify, the legal precedent might justify such a result. In fact, however, as we demonstrate below, the appellants in this Court are now being offered as scapegoats because the attorneys representing them while they were witnesses in the trial framed their legal objections in a form that did not coincide, in all particulars, with the form chosen successfully by the attorney representing the defendant who was believed by the prosecutor to be a helpful informer. Purely on the basis of this departure in form, the appellants have been prevented in their criminal case from asserting a meritorious defense that would have re-

sulted in the dismissal of the charge as a matter of law or in their acquittal by the jury.

In our Argument we first discuss the plainly erroneous legal position taken by Judge Griesa -- i.e., that a conscious waiver of a legal claim in a civil contempt proceeding bars the alleged contemnor from making that claim as a defense to his criminal prosecution. That proposition is wrong as a matter of simple procedure -- that is, under principles of res judicata or collateral estoppel. It is even more wrong when applied to prevent defenses by those accused of crime in federal courts, who enjoy Sixth Amendment rights. And it is, if possible, most wrong when used to bar constitutional claims that evidence has been unconstitutionally and illegally obtained and its fruit is being used in a federal criminal proceeding.

We turn next to an examination of the record of the civil contempt proceeding. We demonstrate that Judge Griesa simply misread that record. In fact, the claims sought to be made below were uttered -- albeit inartfully -- even before the appeal was taken. More cogently, however, those claims were made again after this Court's disposition of the appeal, and Judge Bauman suggested more than once that they should be presented in the context of a defense to a criminal contempt

charge. Since the contempt allegation charged that the refusals on both June 8 and 27 were a single violation of the order, Judge Griesa could not ignore the justification for disobedience stated on June 27 -- after this Court's action. If the appellants' attorneys preserved their rights to a "taint hearing" on that occasion, it could not be said to have been waived "in a civil contempt proceedings before Judge Bauman and in the appeal to the Court of Appeals" nor could it now be contended that the defense to the criminal charge is an effort "to litigate this issue afresh." Accordingly, even if there were some room here for application of a doctrine of res judicata barring litigation of issues which were not raised for "strategic" reasons in the civil contempt proceeding, the doctrine simply has no relevance.

In the following portion of our brief we deal with the religious objection asserted by the appellants to testifying during the trial before Judge Bauman. We recognize, as this Court held on the initial appeal taken by Smilow from the order requiring him to testify before the grand jury, that there are times when the government's need to have "every man's evidence" outweighs any First Amendment protected assertion of religious liberty. But this Court noted in Smilow v. United States, 465 F.2d 802, 804-805 (2d Cir. 1972), that

the religious right is overriden when the penalty "is narrowly drawn to effectuate the goal of obtaining vital testimony." We call attention, in this regard, to the fact that, unlike the situation in Smilow, the penalty is being imposed on the appellants at this time, when the state can no longer say this is the only way the "facts can conveniently be obtained."

As an Appendix to this brief we attach the entry in The Jewish Encyclopedia which describes the traditional Jewish view of moserim ("tablebearers"), viewed by Jewish tradition as the equivalent of serpents, deservent of the most severe punishment. Appellants' reliance on this tradition was no mere cover to avoid personal discomfort; the many days they have already spent in jail as a result of their steadfast refusal to testify bespeaks the sincerity of their convictions.[4/] Given the sincerity of this belief, its sound basis in Jewish law and tradition, and the absence of any purpose to this prosecution other than punishment, we submit that the trial was rendered unfair by Judge Griesa's refusal to permit the jury to consider appellants' religious reasons

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4/ Prison is a particular hardship to them since kosher food has repeatedly been denied them -- at least initially -- on each visit to federal detention facilities, even in the face of court orders directing that it be made available.

as a factor in deciding wilfullness.

We submit that in any case where wilfullness must be proved by the prosecution -- whether or not "specific intent" is the proper standard -- a defendant is entitled to tell a jury of his peers what was in his mind when he committed the allegedly criminal act. To prevent a defendant from explaining his conduct in this way -- whether or not his explanation states a complete defense -- is a denial of his right to put on a defense.

I

AN INDIVIDUAL CHARGED WITH CRIMINAL CONTEMPT IS NOT PRECLUDED FROM ASSERTING AT HIS TRIAL ALL AVAILABLE DEFENSES, INCLUDING THOSE HE DELIBERATELY WAIVED DURING AN EARLIER CIVIL CONTEMPT PROCEEDING

We note, preliminarily, what this case does not involve. This Court is not presented with a situation in which criminal defendants fully litigated an issue with the government in an earlier civil or criminal proceeding, lost that issue after a full hearing, and now attempt in the second lawsuit to relitigate the same question previously fought out and decided. If that were the case, there would be a split of authority as to whether the same factual issue might again be litigated in the criminal action. In Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968), the Court of Appeals for the Ninth Circuit held that a judgment in a prior criminal case, in which it was actually determined that the defendant was an alien, precluded litigation of the same factual issue by the defendant in a second criminal proceeding. Relying on an earlier district court decision in California involving very similar facts (United States v. Rangel-Perez, 179 F.Supp. 619 (S.D. Cal. 1959)), the Ninth Circuit

held that "wise public policy and common sense judicial administration combine to advocate the application of the doctrine against a defendant in criminal cases as to those issues which have in fact been litigated and adjudicated in a prior criminal case between the same prosecutor and the same defendant." 394 F.2d at 787 (emphasis added). On the other hand, a leading Third Circuit decision, United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943) has often been cited for the contrary ruling. In DeAngelo, the Third Circuit held that a prosecutor was barred by collateral estoppel from a second litigation of the same facts (now made a constitutional rule by Ashe v. Swenson, 397 U.S. 436 (1970)), although it said that a defendant would not be similarly bound: "Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto." 138 F.2d at 468 (emphasis added). See also, e.g., United States v. Kramer, 289 F.2d 909, 918 (2d Cir. 1961); United States v. Bruno, 333 F.Supp. 570, 575-576 (E.D. Pa. 1971); United States v. Carlisi, 32 F.Supp. 479, 481-483 (E.D.N.Y. 1940).

Judge Griesa held that the wiretap issues sought to be litigated in this case were barred because they had not been litigated.

Nor is this a case where witnesses have concealed from a court which orders them to testify a particular reason or reasons why they may justifiably refuse to give testimony. If, for example, a witness subpoenaed to testify in a trial were able to invoke the Fifth Amendment privilege against self-incrimination in response to questions asked, but he deliberately concealed the availability of that privilege until his criminal contempt trial, it would be fair for the criminal court to treat his earlier silence as an abandonment of that defense. That was the ground taken by the Supreme Court in United States v. Bryan, 339 U.S. 323, 331 (1950), where it was held that "persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery." These "duties and obligations" included, in the Court's view, the statement of "reasons for noncompliance upon the return of the writ." 339 U.S. at 332. In this case, as our Statement

demonstrates, counsel for both appellants attempted to point out both before and after the case came to this Court that their clients' testimony was being sought as the fruit of unlawful government conduct. On both occasions, their efforts were rebuffed. Their claim was, therefore, no secret from the trial judge, and they did not try to play "a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." 339 U.S. at 331.

What this case does involve is, at most, an imperfect or imprecise assertion of rights by appellants' lawyers, and a conclusion that the claim could have been properly presented and was not. Judge Griesa then applied the principle that res judicata bars not only matters actually litigated but "also as respects any other available matter which might have been presented. . . ." Grubb v. Public Utilities Comm'n, 281 U.S. 470, 479 (1930), quoted in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1940). We know of no criminal case -- federal or state -- in which the doctrine of res judicata as to matters which "might have been decided" has been applied to foreclose a defendant.[5/]

5/ In United States v. Bowles, 331 F.2d 742 (3d Cir. 1964), a Court of Appeals refused to apply the doctrine of res judicata in deportation cases to issues that had not actually been litigated.

Indeed, we submit that even the prosecution, which labors under the constraints of the Double Jeopardy Clause of the Fifth Amendment, is not foreclosed by a "might have been decided" rule -- as witness the continued viability of Bryan v. United States, 338 U.S. 552 (1950), under which the prosecution is entitled to retry a criminal case even though its evidence at a first trial is found insufficient to sustain a conviction.

As long ago as Cromwell v. County of Sac, 95 U.S. 351 (1876) -- a landmark case on the subject of res judicata -- the Supreme Court distinguished between situations where factual issues are actually litigated and those where the "might have been" litigated rule is applied. In concluding that the latter is a principle only occasionally to be invoked, the Court listed considerations highly applicable to these facts (94 U.S. at 356):

> Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction.

The appellants in this case have now been foreclosed from litigating in a criminal proceeding -- where their liberty was at stake for an indefinite period -- an issue which it is said they could have raised in an earlier c il proceeding -- a proceeding with a different objective where the sanction was different in both kind and degree.[6/] In the earlier proceeding, they were witnesses, not defendants. They may well have viewed the personal risk to themselves as substantially less than the risk they face in a criminal prosecution directed at them. The "value" of what was at stake, the "difficulty of obtaining the necessary evidence," together with the anticipated "expense of litigation" and the "personal situation" of both Richard Huss and Jeffrey Smilow were all different in June 1973 than they were in November 1973. It is simply unfair to bind them as criminal defendants to courses their lawyers may have taken on their behalf when they were mere witnesses during a criminal trial.

This Court's realistic approach to the doctrines of res judicata and collateral estoppel on which Judge Griesa relied is demonstrated by its recent decision in Lombard v.

6/ Collateral estoppel does not apply from a civil to a criminal proceeding. United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953).

Board of Education, ____ F.2d ____ (No. 73-2057, July 22, 1974). This Court held in Lombard that the principle that claims are barred if they could have been raised between the parties in an earlier related proceeding is not to be applied automatically but must rest on "policy considerations" relating to judicial economy. See Slip Opinion, p. 4916. In that case, the Court refused to bar a constitutional claim not asserted in two earlier state court actions between the parties on various grounds, noting that the appellant may have "inadvertently or through his lawyer's mistake failed to raise the constitutional claim. . . ." Slip Opinion at 4917. The Court also refused to find that the omission was a "waiver" or that the claim was barred by "collateral estoppel (issue preclusion)." Neither in Lombard nor in this case was the factual issue on which preclusion was sought "necessary to the decision." Slip Opinion at 4919 (emphasis in the original).

This case is one in which the arguments against "issue preclusion" are far stronger than in Lombard for several reasons. First, the nature of the right asserted by the appellants at their criminal trial is different from the right claimed in the civil contempt proceeding. During the Hurok trial, the appellants were asserting a statutory right not to

be asked questions flowing from government illegality. The mechanism for vindicating that right, as well as the right itself, were based upon federal statute -- 18 U.S.C. §§ 2510-2520 and §3504. Compare Gelbard v. United States, 408 U.S. 41 (1972), with United States v. Calandra, 94 S. Ct. 613 (1974). In their criminal trial, the appellants were asserting, as well, the Fourth Amendment right not to be convicted and sent to jail on unlawfully obtained evidence -- or fruit of such evidence. To preclude the claim at the criminal trial because it had not been raised when the appellants were witnesses is to foreclose a constitutional claim for failure to assert a statutory one.

Second, the application of res judicata or collateral estoppel because of action or inaction in the civil contempt case infringes upon the appellants' constitutional rights as criminal accused in a federal court. Is an accused whose defense is barred in this way really afforded the rights of confrontation, compulsory process and jury trial which the Sixth Amendment guarantees? If a factual element of the offense did not have to be proved because it was accepted on res judicata grounds, it would be clear that these rights had been violated. See The Use of Collateral Estoppel Against the Accused, 29 Colum. L. Rev. 515, 521 (1969). The same is true,

we believe, when a line of defense -- legal or factual -- is barred on this ground.

Third, the use of res judicata or collateral estoppel to prevent a criminal defendant from challenging the prosecution's evidence is particularly unsound when the challenged evidence may have been obtained unconstitutionally and the result of the legal ruling is to permit illegally obtained evidence to be used. The Exclusionary Rule is designed not merely to enable criminal defendants to keep evidence out of the courtroom but to preserve the integrity of the judicial process. To be sure, a defendant may deliberately waive the protection of the Rule and thereby permit evidence to be introduced. But if the "waiver" is less than totally voluntary -- as was surely true here -- the use of the evidence taints the proceeding and diminishes the dignity of the forum. Given the massive illegality found by this Court in United States v. Huss, supra, and the prosecution's concession that these appellants were found by exploiting Sheldon Seigel -- the direct fruit of that illegality -- it would demean the federal court to permit a conviction to rest on such evidence.

A final word must be said regarding the practical consequences of the course followed by Judge Griesa. In many cases -- indeed, in one of Jeffrey Smilow's earlier appear-

ances in this Court -- the prosecution has belatedly "discovered" unlawful surveillances which it had previously denied. See, in addition to Smilow v. United States, 465 F.2d 802 (2d Cir. 1972), vacated and remanded, 409 U.S. 944 (1972); In re Tierney, 465 F.2d 806, 813 (5th Cir. 1972); United States v. Friedland, 316 F.Supp. 459 (S.D.N.Y. 1970); United States v. Smith, 321 F.Supp. 424 (C.D. Cal. 1971). In view of this less-than-proud history of inaccuracies, it is fitting, we believe, that the matter of electronic surveillance be a continuing obligation on federal authorities, reviewable every time they seek to prosecute an individual who is known to have been overheard on illegal wiretaps or whose associations are such that his overhearing was highly probable. If the approach taken by Judge Griesa were approved, a single denial -- often in an inadequate form (see United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974) -- would forever cut off further inquiry.

We recognize that there may be extraordinary situations in which there could not conceivably be any relevance to the records of electronic surveillances. In re Dellinger, 357 F.Supp. 949 (N.D. Ill. 1973), is an illustration of such extreme circumstances. The only basis for the charge of criminal contempt in that case (which grew out of the "Chicago

Seven" trial) was misconduct in the courtroom, and no intercepted telephone conversations could have been relevant to the prosecution's proof or to any line of defense. In the present case, the appellants' presence on the stand as witnesses -- at the very heart of the accusation -- may have resulted from the exploitation of illegal wiretaps in that the appellants were identified by Sheldon Seigel. Moreover, the existence of the wiretaps related to the appellants' defense -- i.e., that they had "just cause" to refuse to answer questions. Thus Dellinger is a totally different case from this one.

II

AN EXAMINATION OF THE CIVIL CONTEMPT RECORD DISCLOSES THAT THE ISSUES ALLEGEDLY "WAIVED" WERE, IN FACT, ASSERTED AND RESERVED BY THE JUDGE FOR A CRIMINAL CONTEMPT PROCEEDING

In our Statement we have detailed and, on occasion, quoted the colloquy which preceded the appearance on the witness stand of both Huss and Smilow on June 8 and June 27. The full record of the proceedings before Judge Bauman discloses that, contrary to Judge Griesa's finding, counsel for both appellants requested that illegal wiretaps be divulged and that hearings be conducted on the source of the information which had led the prosecutor to the two witnesses. In fact, counsel for Huss initially moved on the basis of United States v. Tane, 329 F.2d 848 (2d Cir. 1964), for an order barring the calling of his client because his identity was the fruit of unlawful wiretapping by the government. The prosecutor replied at that time that Huss would not have standing to object to illegal conduct vis-a-vis Seigel "until he was held in contempt." And yet -- by a "Catch-22" formula that defies explanation -- the prosecution has now successfully contended, when Huss sought to raise the issue in his contempt trial, that the claim then came too late.

After Huss refused to testify his counsel again stated that he intended to appeal the civil contempt order on several grounds. The first ground asserted was the religious issue and the second pertained to "the taint by the United States." In answer to the judge's question, he explained that the second claim was "[t]hat they discovered the identity of this witness through wiretaps and pressure placed on the witness Seigel without which they would not have learned the identity of Mr. Huss." (App. 69). The judge then replied that he had already "ruled to the contrary." The prosecutor insisted that Huss did not have "standing" to assert the claim and that it was, in any event, rendered frivolous by Judge Bauman's disposition of Seigel's contention (App. 69-71).

After the action taken by this Court, attorneys for the appellants clarified their previous statements and indicated that they had intended, by their earlier motions, to request a hearing to determine "whether or not taint was involved" (App. 34). Some discussion followed regarding the possibility that Seigel had directed the prosecutor to Smilow, and Smilow's counsel then asked, as well, for a hearing on other wiretaps "to see whether or not there is any taint you'd

have to decide" (App. 37). The request was made a second time (App. 38-39). Judge Bauman declined to hold the hearing.

It is difficult to understand how Judge Griesa could have concluded on this record that there was a "strategic decision" not to request a hearing on illegal wiretaps and that there was a deliberate waiver of the argument "that the Government learned of defendants' identity from illegal surveillance, and that any evidence they might have given at the criminal trial would therefore have been tainted." If anything, counsel pressed time and again for a hearing on "taint," and it was repeatedly denied.

The fact that the request was made more specifically after this Court's action than it had been before does not bolster Judge Griesa's conclusion. The orders to show cause on which the appellants were tried alleged that Huss and Smilow had engaged in a single criminal contempt by their refusals on June 8 and 27. Accordingly, the judge and jury were obliged to consider their conduct on both dates and determine whether there was "just cause" for the over-all refusal. Their attorneys' requests for a hearing on June 27 did not, therefore, come too late. According to the allegation against them, it came in the middle of their allegedly unlawful course of conduct.

Judge Griesa did not specify on what action or in-

action he relied on in concluding that the appellants' claim had been waived during the earlier proceeding. If he was relying on their counsel's failure to use the word "hearing," we submit that the word was repeatedly used when the witnesses were recalled after the appellate disposition. And, in any event, the request made that the judge restrain the calling of the witnesses and that he order production of the wiretaps were initial moves towards that end. When Judge Bauman summarily denied those requests, there was little purpose in seeking a hearing.

A second possibility is that Judge Griesa relied on the absence of any formal written suppression motion in the proceedings before Judge Bauman. It is true that Seigel's counsel (who was, after all, representing a man who was not merely a witness but also a named defendant) submitted an extensive written memorandum in support of his request that Seigel not testify. But Judge Bauman never suggested to Huss and Smilow's counsel that their oral applications were inadequate because they were oral. He ruled on the merits of their requests, and it would be sheer formalism now to uphold his sweeping decision on the merits on the ground that the request was insufficient in form.

Ad additional well-established principle supports

our argument that Judge Griesa erred in reading the record of the earlier proceeding as a waiver of Huss and Smilow's claim regarding unlawful electronic surveillance and other government illegality. The appellants' right to exclude evidence on this basis is, as we have previously noted, of constitutional dimension. Waiver of a constitutional right must be deliberate, knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). That rule applies not only to rights spelled out in the Constitution but also to the procedural right to exclude unlawfully obtained evidence in a federal prosecution. Kaufman v. United States, 394 U.S. 217 (1969). By those standards, this "waiver" was plainly inadequate.

We note finally, in concluding this section of our argument, that there can be no real question as to the substantiality of the appellants' claim on the merits. Judge Griesa recognized, at the outset of his opinion, that the discovery request pertained to the claim that Huss and Smilow had been discovered by illegal surveillance "and that any evidence they might have given at the criminal trial would therefore have been tainted." If they had established this fact on production of wiretap records and a full disclosure of the means used by the prosecution in reaching them, they

would have had as much "just cause" to refuse to testify as Sheldon Seigel was found to have in this Court's opinion. (Indeed, we believe that the application of United States v. Tane, supra, to the prosecution's concession, after appeal, that Seigel led them to Huss and Smilow should, ipso facto, require dismissal of the charge.) In order to learn the facts necessary to make the argument, the appellants are entitled to the requested disclosure. This Court determined that Seigel had been told by the polic officer with whom he dealt that he had been discovered "on wiretaps". 482 F.2d at 49. The original tapes or recordings have been destroyed, but the surviving logs contain no entries to corroborate this assertion. This fact, combined with the police officer's use of the plural and the fact that electronic curveillances were conducted on Seigel (without his knowledge), together with the strange timing of all these overhearings all give rise to the inference that there are relevant wiretaps -- in addition to those on the JDL office and on Seigel -- which have not yet been disclosed. Before risking a jail sentence of a year, these appellants were surely entitled to know the extent of other illegal acts which may have pointed the prosecution to them.

Affidavits submitted by Huss and Smilow in support of the discovery motion established that they used the JDL offices on a regular basis (App. 120-122, 145-148). Accordingly, they had standing, as regular occupants of the premises, to secure disclosure of and object to all overhearings involving those offices. See United States v. Paroutian, 299 F. 2d 486 (2d Cir. 1962); United States v. Harris, 388 F.2d 373 (7th Cir. 1967); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

Moreover, the appellants would have standing to secure disclosure to them and suppression as evidence if it can be shown that an unlawful surveillance was directed at them as targets -- even if they were not overheard. E.g., Baker v. United States, 401 F.2d 958, 981-984 (D.C. Cir. 1968); United States v. Miguel, 340 F.2d 812, 814 n.2 (2d Cir. 1965), cert. denied, 382 U.S. 859 (1960); Foster v. United States, 281 F.2d 310 (8th Cir. 1960). The wiretap provisions of the Safe Streets Act define "person aggrieved" to include the person "against whom the interception was directed," thereby borrowing the language of Jones v. United States, 362 U.S. 257, 261 (1960). Starting more than one month before the date of the Hurok bombing and until more than one month

after that bombing, the government maintained an illegal wiretap on Seigel's home telephone. Since Seigel was, by then, a government informer, the wiretap was plainly not directed "against" him; it was designed to catch others -- like Huss and Smilow -- who might have spoken on that telephone or been mentioned in conversations engaged in by Seigel and others. They, therefore, were the targets of the wiretap and are entitled to full disclosure of such records as the prosecution still has.

It is not irrelevant, in this regard, that Section 2515 of Title 18 absolutely forbids the use of wiretap evidence or leads obtained therefrom in a federal criminal trial. This flat prohibition is not limited by any language that ties suppression to a motion by a "person aggrieved." The policy of the wiretap provisions of the Safe Streets Act may, therefore, be more restrictive of government use of wiretap evidence that would the Fourth Amendment, standing alone.

In any event, refinements of standing and details as to which conversations are properly producible for examination by the appellants should have been considered, in the first instance, by Judge Griesa. He never reached these questions, simply denying the production motion "in all respects." That action was plainly erroneous.

III.

THE TRIAL JUDGE VIOLATED THE DEFENDANTS' CONSTITUTIONAL AND STATUTORY RIGHTS BY EXCLUDING EVIDENCE REGARDING THE RELIGIOUS CONVICTIONS WHICH MOTIVATED THEM TO ACT

The trial transcript begins with an error which ran through the entire short proceeding in which the defendants' guilt was determined. During Huss' initial questioning in the Hurok trial (on June 8), his attorney sought to explain to Judge Bauman the rationale for his client's belief that testimony would be a violation of religious principle. At the conclusion of this recitation, Huss specifically acknowledged that what his attorney had explained constituted his reason for refusing to testify (App. 173). The prosecutor sought to excise this explanation from the portion of the transcript read to the jury and, over defense counsel's objection, he was permitted to do so. Judge Griesa reasoned that the religious objections "are irrelevant to our case" (App. 174), and that this explanation would not be permitted before the jury "in any form" (App. 175).

We argue below that it was error to keep from the jury the defendants' consistently expressed prime motivation for refusing to testify -- whether or not this explanation,

if believed, would give them a total defense or, indeed, any defense at all. The least dignity that can be accorded a defendant whose liberty is in jeopardy should be the opportunity to explain to those who decide on guilt or innocence what was in his mind when he committed the allegedly unlawful act. This error began with the excision of counsel's explanation of the religious rule and was aggravated by later rulings -- particularly the refusal to allow the defendants to testify personally as to their state of mind.

Before leaving the matter of the abridged transcript, however, we think it worthy of notice how one-sided the transcript became once the explanation was cut. In the form read to the jury, Huss' unadorned statement regarding Jewish law made little sense, (App. 195), and was immediately rejected on the authority of two federal judges (App. 196). Very shortly thereafter, the jury heard that the judge presiding while Huss was testifying said, "The witness has consistently refused to answer and is heading in the direction of a contempt and I shall deal with that at the appropriate time" (App. 201). And then came Judge Bauman's finding, stated twice (without clarification as to whether it was civil or criminal) that he

found the witness "in contempt of [this] court" (App. 202).

The reading of the Smilow transcript was, in this context, equally devastating. This time the rejection of the religious claim was said to be by two district judges and by the Second Circuit "in the first Smilow case by Judge Feinberg" (App. 206).[7/] Thereafter, Judge Bauman held that Smilow was in civil contempt (App. 211-212).

The reading of the second transcripts was even more devastating in its selective manner. The jury heard that Judge Bauman had initiated the criminal contempt charge by asking the prosecutor to file charges and heard the judicial statement: "I, for one, regard your refusal to answer as criminal contempt" (App. 214). Thereafter the underlying crime was described by Judge Bauman as "a dastardly, vicious, unforgivable, unforgettable crime . . . a case that in my mind involves murder" (App. 216). Judge Bauman continued, in the portion read to the jury "People who deliberately [frustrate the administration of justice] will learn the power of the law even if there are those who have litterally gotten away with murder (App. 216). These statements were read after the prosecutor had gratuitously inserted in his

---

7/ The jury could not help but wonder what "the first Smilow case" was, and probably assumed that Mr. Smilow had already been convicted of something. Nor, one supposes, would the jorors have ignored the fact that the judges named by the prosecutor -- Judges Weinfeld and Feinberg -- bore names which might imply that they -- along with Judge Bauman -- might have been familiar with Jewish law.

opening statement the assertion that as a result of the Hurok bombing "a secretary by the name of Iris Cohen was killed . . . ." (App. 183), and the series of unanswered questions suggested that the defendants had been participants in the offense.[8/] Thereafter, the reading of the transcript again brought home to the jury Judge Bauman's conclusion: "[Y]our failure to answer the questions put to you constitutes in my judgment criminal contempt" (App. 220). And that judicial finding was capped with an extraordinary judicial directive regarding the seriousness of the offense (App. 220-221):

> Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment if this man is guilty to six months, and therefore I want every letter observed. I want him proceeded against in writing, I want the case to proceed to a jury trial, and I want the judge, whoever he is, to have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that but the law will make them pay.

8/ Huss was asked, for example, "Mr. Huss, on the morning of January 26, 1972, did you leave an incendiary device contained in a black attache case in the offices of Sol Hurok Concerts Incorporated?" and he declined to answer (App. 219). The prosecutor obviously could not have believed that the answer to the question would be affirmative or he would have charged Huss as a co-defendant.

This announcement -- which had no intrinsic relation to the questions asked and the refusals to answer -- could only have been understood by the trial jury as an urgent demand by Federal District Judge Bauman -- an individual whose standing equalled that of Judge Griesa, whose view on the law they were bound to respect -- for the conviction of Mr. Huss. If portions of the transcript were to be selected out, this passage, which was highly inflammatory in nature, was a prime subject for such excision. Instead, relevant sections were omitted and Judge Bauman's prejudicial remarks were kept.

There is, to be sure, no indication in the record of defense counsel's objection to the particular intrusion of Judge Bauman's statements. But in view of Judge Griesa's early indication that anything Judge Bauman said to either of the defendants was admissible (App. 174), it would have been useless to object. In addition, defense counsel's objection would simply have called attention to these inflammatory passages. Finally, even if there were no other error in relation to the account given the jury, we believe the inclusion of these inflammatory fragments

would have constituted "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure warranting reversal even in the absence of objection. This jury was told, by the reading of those portions of the transcript, that in the opinion of another federal judge the defendants had committed criminal contempt. And it was also informed -- in a manner that could only have had an inflammatory effect -- that murder was involved.

The defendants had an explanation for what they did, and this explanation related to the wilfull state of mind which the prosecution had to prove. But Judge Griesa refused to allow any defense testimony regarding the defendants' motives. At the opening of the defense case, the defendants' attorney said to the judge (App. 224); emphasis added:

> I am going to put on Mr. Huss. I am going to ask him to testify as to what happened in the summer of 1972 with relation to certain members of the Jewish Defense League coming to see him outside of the State of New York and then I am going to ask him to testify with relation to his religious conviction and I recognize or make an offer of proof with relation to that and I recognize that your Honor will exclude it.

Judge Griesa replied (App. 224-225):

> Well, I am clear that I would refuse to let him testify on the religious objections, that the question of religion is plainly irrelevant.

Thereafter, Huss was questioned out of the jury's presence on the matter of his intimidation by other JDL members. When he admitted truthfully that threats made to him by others did not "influence" his decision not to testify (App. 238), the judge ruled that the testimony was inadmissible. Having been frustrated on both aspects of possible defense testimony, defense counsel rested without offering any evidence (App. 240).

The trial judge's refusal to allow the defendants to testify with regard to their state of mind violated their right to present a defense. The well established rule is that "[w]here a defendant's intent is in issue he should be permitted to testify as to his motive and actual intent or state of mind." United States v. Hayes, 477 F.2d 868, 873 (10th Cir. 1973), and authorities there cited. See, in this Circuit, United States v. Kyle, 257 F.2d 559, 563 (2nd. Cir.), cert. denied, 358 U.S. 927 (1958). See also Krogmann v. United States, 225 F.2d 220, 229 (6th Cir. 1955).

The fact that the defendant's testimony regarding his own intent would not, even if believed, establish a

legal defense does not mean that he may be prevented from giving it and arguing to the jury that it relates to his intent. In Collazo v. United States, 196 F.2d 573 (D.C. Cir.) cert. denied, 343 U.S. 968 (1952), which involved a shooting spree at Blair House conducted by Puerto Rican nationalists, the defendant gave "hours of testimony . . . concerning his version of a long span of Puerto Rican history, culminating in the oppression of the Puerto Rican people by the government of the United States . . . ." 196 F.2d at 578. The trial judge instructed the jury that "the defendants' views about the situation in Puerto Rico have absolutely nothing to do with this case," and that instruction was challenged on appeal. The court of appeals affirmed that portion of the instruction on the ground that it was correct to put to one side conditions in Puerto Rico. The court went on to say (196 F.2d at 581), emphasis added:

> The jury were not instructed to disregard Collazo's statements on the stand as to the alleged limited purpose of the demonstration. He was properly allowed to testify as to his own intent. What was excluded from the consideration of the jury was the prolonged collateral testimony concerning Puerto Rico.

In this case, by contrast, the defendants were not permitted to testify as to their own intent, and that ruling

was erroneous. Its error is demonstrated also by the course approved by the Courts of Appeals for the Tenth and Fifth Circuits in two other cases involving similar questions. In United States v. Tijerina, 446 F.2d 675 (10th Cir. 1971) cert. denied, _____ U.S. _____ (1972), the defendant was convicted on various counts relating to the destruction of federal property. He testified and gave "a lengthy explanation of the purposes of the encampment, including the signing of a petition to be sent to the President, Congress and the Supreme Court and matters to be voted on by the group." 446 F.2d at 679. His testimony was cut off only when he began an elaborate discussion of the issues relating to the San Joaquin land grant. The court of appeals sustained this ruling only after it noted that "[a]ppellant's detailed explanation of his intent and background of the meeting and its surrounding circumstance was admitted." Ibid.

Closest, perhaps, to the issue presented here was that in Leary v. United States, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1968), where a defense to a charge of transportation of marijuana was that it was used by the defendant for religious purposes. The court of

appeals rejected the claim that the defendant was entitled to an acquittal on this ground if his religious claim was "honest and in good faith." But its recital of the trial proceedings indicates that even though the trial judge did not view the religious justification as an adequate defense, he permitted the defendant to testify fully on the subject. See 383 F.2d at 856-857. That testimony related, as would the testimony of the defendants in this case, to the essential issue of criminal intent. If Leary, Tijerina, and Collazo were permitted to explain their actions on the basis of their religious and political beliefs before the jury that determined their guilt or innocence, there is no reason why Huss and Smilow were not given the same opportunity. By depriving them of it, Judge Griesa eliminated the only remaining hope they had for consideration of their total conduct by a jury of their peers.

A final blow delivered by Judge Griesa to the defense of lack of wilfullness that was sought to be presented at trial came with the summation and the judge's instructions.

Defense counsel argued as follows in summation (App. 247):

> The Judge will charge you that this is a crime which requires wilfulness, which requires intent. Wilfulness to show contempt for this court, for the judge or judges of the Southern District of New York.
>
> In light of the fact that the defendants asserted that their religion would not permit them to testify against another Jew you have to ask youselves whether that shows a wilfulness to show contempt for the court or whether it doesn't show a respect for a higher law.

The prosecutor did not object to this argument. Nor did he refer to the matter of religious convictions in any way during his summation. He emphasized the portion of the Hurok trial transcript which, as we have previously noted, suggested to the jury that Judge Bauman had already found that the defendants committed criminal contempt. He quoted, in full, Judge Bauman's statement to Huss that his refusal "constitutes in my view criminal contempt of court" (App. 250) and his statement to Smilow that Smilow's refusal "constitutes criminal contempt of court and that the punishment for criminal contempt is without limit" (App. 251).

When Judge Griesa delivered his charge to the jury, however, he mentioned specifically the "rules of Jewish

religious law" which, he said, had been referred to in the transcripts and in the defense summation. He went on to say (App. 266):

> Now, Judge Bauman advised both Huss and Smilow that this religious objection was not in fact a valid ground for refusing to testify.
>
> I instruct you now, as a matter of law, that the religious objection was not a valid ground for refusing to testify.
>
> I further instruct you that the religious objection is in no way a defense to the present criminal contempt case.
>
> With all respect to defense counsel, I must instruct you that you are not entitled to consider, in your deliberations, the religious objection or the obedience to a higher law. You are not allowed to consider that on the question of whether either of those defendants is guilty of criminal contempt. That religious objection is not a valid defense here nor was it a valid ground for refusing to testify in the proceedings before Judge Bauman.

This instruction -- to which defense counsel did object (App. 275) -- was erroneous for several reasons. Our most sweeping quarrel with it relates to the last sentence, which assumes that the same considerations apply in a criminal contempt case as in a civil contempt situation. We submit that the constitutional approach is quite different. In the civil contempt context, as this Court noted in its Smilow

opinion, an enforceable order directing the witness to testify may be justified if "narrowly drawn to effectuate the goal of obtaining vital testimony." 465 F.2d at 804-805. If not directed to that narrow and specific goal, the governmental interest may not be sufficient to override the constitutional liberty. And this Court observed, as well, that in the civil contempt situation it might be asserted that order directing conduct which conflicts with religious precepts might be the only way that "facts can conveniently be obtained."

These considerations no longer apply when -- after the event -- criminal contempt is in issue. At that time, the purpose of the sanction is to punish for past conduct, and it is altogether questionable whether punishment by imprisonment makes any sense whatever when applied to someone who demonstrates conclusively that obedience to a higher law makes the usual criminal sanction meaningless. It is, we submit, a proper accomodation to the constitutional principles established by cases such as Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), to say that if a witness interposes a good-faith religious objection to testifying, a court may and should test that

witness' belief and vindicate the interest in law-enforcement by issuing a civil contempt order to coerce the witness to testify. But if the witness stays in jail and still refuses to testify, punishment after the fact cannot be justified by any "compelling state interest" and might, therefore, be barred by the First Amendment.

This case -- and Judge Griesa's instructions -- do not require any such far-reaching holding, however. Even granting the validity of the first two paragraphs of the instruction quoted above, Judge Griesa erred in charging that "the religious objection is in no way a defense" and that the jury was "not entitled to consider . . . the religious objection." To the extent that the defendants' reliance on that objection related to their criminal intent -- or lack of it -- the evidence was relevant and was properly to be considered. By giving the third and fourth paragraphs of the quoted portion of the instruction, Judge Griesa focussed attention on the only defense asserted by appellants' counsel and conclusively directed the jury to ignore it for all purposes.

Separately and in combination, the abridged transcript, the refusal to allow defendants to testify as to their motives,

and the specially selected instruction deprived the jury of an opportunity to consider a factor that related to guilt. At the very least, a new trial should be ordered at which a jury will understand what happened and why.

CONCLUSION

For the foregoing reasons, the judgments of conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

United States of America	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	Docket Nos. 74-2047
	)	and 74-2127
Richard Huss and Jeffrey Smilow,	)	
	)	
Defendants-Appellants	)	
	)	
	)	

I hereby certify that two copies of Appellants' Brief on Appeal were served, this 18th day of October, 1974, first class mail, postage prepaid, on Paul Curan, Esq., Assistant U.S. Attorney, United States Courthouse, Foley Square, New York, New York 10001.

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Bibliography: M. Zschommler, *Mosen's Erinnerungen*, Plauen, 1862; *Julius Mosen; eine Biographische Skizze*, Oldenburg, 1878; *Jüdischer Plutarch*, ii. 219-221.

S.

MOSENTHAL, SOLOMON HERMANN VON: Austrian dramatist and poet; born at Cassel, Hesse-Nassau, Germany, Jan. 14, 1821; died at Vienna Feb. 17, 1877. He attended the gymnasium at Cassel and the Polytechnicum in Carlsruhe. He soon withdrew, however, and in 1841 went to Vienna as private teacher in the house of Moritz von Gol[illegible]. In 1847 his "Der Hollander Michel," a dramatization of the story, was produced; and this was succeeded in the following year by his three-act drama "Die Sklavin." Neither of these had any enduring success. Two years later (Dec. 18, 1849) the production of his poetical drama "Cäcilia von Albano" received the cordial approval of public and critics alike, and opened for him the doors of the Burgtheater. Its success was still further heightened on its publication in Budapest in 1851. His next production, "Deborah" (Budapest, 1849; Presburg, 1875, 6th ed. 1890), was translated into the principal modern languages. In English it became famous under the title of "Leah, the Forsaken." It was first produced at the royal theater in Berlin in 1850.

Solomon Hermann Mosenthal.

In the meantime Mosenthal had, early in 1850, secured a position as librarian at the Ministry of Education. In the same year his play based on the novel "Ein Deutsches Dichterleben" by Otto Müller, was produced at the Burgtheater. It was founded on the story of the life of the poet Bürger. His next production was "Der Sonnenwendhof," Leipsic, 1857 (3d ed. 1875; fifteen years after his death a Low German version by Anny Schäfer, under the title "Auf'm Sunnwendhof," was published in Munich in 1892 and included in the "Münchener Theater-Bibliothek"). There followed in succession: "Das Gefangene Bild," Stuttgart, 1858; "Düweke," Leipsic, 1860; "Die Deutschen Komödianten," *ib.* 1863; "Pietra," tragedy, *ib.* 1865; "Der Schultz von Altenbüren" *ib.* 1868; "Isabella Orsini," 1870, of which an English translation by E. Vincent was published at Vienna in 1875; "Maryna," historical drama, Presburg, 1870; "Die Sirene," comedy, 1875. Mosenthal also wrote the following librettos: for Otto Nicolai, "Die Lustigen Weiber von Windsor," Vienna, 1871 (repr. 1888); for Kretschmer, "Die Folkunger," Dres. 1874; for Brüll, "Das Goldene Kreuz," Ber. 1875; for Carl Goldmark, "Die Königin von Sab[illegible] Vienna, 1888; and "Die Kinder der Heide," m. by Anton Rubinstein.

A volume of his poems was published at Vi[illegible] as early as 1847. A complete edition was issue[illegible] 1866. He also wrote a novel, "Jephtha's Toch[illegible] which was included in the "Neuer Deutscher No[illegible] lenschatz," No. 2, Munich, 1884. A collected e[illegible] tion of his writings, for the arrangement of wh[illegible] he had left instructions, was published in six v[illegible] umes at Stuttgart in 1878; with a portrait.

Bibliography: Necrology in *Neue Freie Presse*, repro[illegible] in *Allg. Zeit. des Jud.* 1877, p. 155; Prof. Hanslick, [illegible] 188; *Meyers Konversations-Lexikon.*

S.

M. Co

MOSER (plural, **Moserim**): An informer, a[illegible] nunciator, or delator; synonyms are "masor" (a[illegible] stract, "mesirah"), "delator" (דילטור), and "m[illegible] shin" (abstract, "malshinut"), from the last of wh[illegible] are derived the Portuguese "malsim," and also [illegible] Spanish "malsin," together with the adjective "m[illegible] sinar" and the abstract nouns "malsindad" a[illegible] "malsineria." Nothing was more severely punis[illegible] by the Jews than talebearing; and no one was h[illegible] in greater contempt than the informer. On acco[illegible] of the fact that his deeds frequently caused m[illegible] chief and even entailed death and destruction, [illegible] sages of the Talmud compared the "moser" to [illegible] serpent.

In Talmudic Times.

The Jews suffered much during the persecuti[illegible] under Hadrian through informers in their o[illegible] ranks; especially teachers of the Law were betra[illegible] by the delators. Simeon ben Yoḥai, having cr[illegible] icized the Roman government, was denounced; a[illegible] he saved his life only by hasty flight. A cert[illegible] Eleazar b. Simon is said to have denounced to t[illegible] Romans Jews who were engaged in freebo[illegible] expeditions against them. Accord[illegible] to Talmudic law, the delator was p[illegible] ished with death; and although [illegible] general the jurisdiction of the Jew[illegible] courts in criminal cases ceased w[illegible] the destruction of the Jewish commonwealth, in [illegible] case of informers the penalty remained in f[illegible] those convicted being punished the more seve[illegible] because they deliberately increased the danger wh[illegible] constantly threatened the people.

There are frequent notices of denunciati[illegible] among the Jews in countries under Arabic r[illegible] A certain Hafḥah ibn al-A'jab and his son Hayy[illegible] denounced Isaac Alfasi, who was thereupon obli[illegible] in 1088 to flee from his home in northern Afr[illegible] and to seek refuge in Spain (Abraham ibn Da[illegible] "Sefer ha-Kabbalah," ed. Neubauer, p. 75). A[illegible] cording to Maimonides ("Yad," Hobel u-Mazi[illegible] in the cities of the West, *i.e.*, of Morocco, c[illegible] viction for delation was of daily occurrence, t[illegible] offenders being declared outlaws and being deliver[illegible] to non-Jews for the infliction of the death-penalt[illegible] Denunciations occurred just as frequently amo[illegible] the Jews of Spain, so that the word "malsin" w[illegible]

the Spanish language (see above).
[illegible]-st of Lucena, Joseph ibn Migas,
[illegible] to be stoned before the close of
[illegible] of Atonement which fell on a Sabbath
[illegible] Zikron Yehudah," p. 55b). Isaac
[illegible] at the end of the fourteenth century
[illegible] assert that from olden times it had
[illegible] been law and custom in the Jewish
communities of Aragon, Valencia, Catalonia, Castile, and Navarre to put
[illegible] [illegible] [illegible]; and even as late as 1432
[illegible] representatives of the Castilian communities
[illegible] truth allege in the statutes which they
[illegible] up that it was the custom throughout
[illegible] put to death one who at any time or in any
[illegible] to act the part of informer.

[illegible] a descendant of a wealthy and re-
[illegible] family who had lost his fortune turned in-
[illegible] In vain was he warned and threatened
[illegible] informer's death. He was probably fa-
[illegible] the authorities and encouraged to con-
[illegible] his nefarious conduct; and he was not to
[illegible] from his chosen path. His own family
[illegible] get rid of him, and insisted on his being
[illegible] Rabbi Jonah of Gerona (nephew of
[illegible] Abraham Gerondi) and Solomon ben Adret
[illegible], because of the insistence of King
III of Aragon, found themselves forced to let
[illegible] take its course and to deliver the informer to
the king. The latter ordered his exe-

Execution of an Informer.

cution, which took place in the year 1280 in the square before the Montjuich, the Jewish cemetery in Barcelona, the arteries of both arms being
[illegible] Solomon ben Adret's Responsa in "J. Q. R."
[illegible]

[illegible] ben Jehiel pronounced the death-penalty
[illegible] an unknown man in Seville who had obtained
[illegible] of some person of high degree and had
[illegible] secretly accused certain coreligionists as well as
[illegible] congregations before the infanta D. Pedro,
[illegible] and guardian of the young king Alfonso XI.
[illegible] ben Jehiel, Responsa, xvii. 1, 8). Just as
[illegible] station had Asher's son, and with him the
[illegible] of the Jewish tribunal at Toledo, Joseph
[illegible] Joseph, Joseph ben Joseph ibn Nahmias, and
[illegible] ben Abraham ibn Nahmias, in pronouncing
[illegible] sentence of death upon the much-dreaded Joseph
[illegible] Samuel, who, on account of his denunciations,
[illegible] already been condemned to death during the
[illegible] of Asher ben Jehiel, but upon whom the
[illegible] had not been carried out on account of the
[illegible] clemency (Judah b. Asher, *l.c.* p. 55a).

[illegible] statutes signed by the communities of Cat-
[illegible] and Valencia Sept. 25, 1354, the exterminа-
[illegible] informers was made a public duty, in the ac-
[illegible] of which every one was required to
[illegible] his utmost assistance ("He-Haluz," i. 22 *et seq.*). This resolution was also adopted by the representative of the Jews of Majorca, where, as a result of the representations of the leader of the community, King Sancho in 1319 issued an order banishing forever from his land all Jews who were proved to be informers

Regulations Against Informers.

[illegible] of the peace ("Boletin Acad. Hist." xxxvi. 133, 143). The Jewish community of Tudela, the largest in Navarre, in March, 1363, passed a resolution (which was renewed fifty years later for a further period of fifty years) to proceed against informers with all possible severity. Any person, whether Jew or Jewess, who should be convicted of being a calumniator of or informer against the congregation or any of its members was to be excommunicated in all the synagogues of the city for a period of fifty years, during which time he or she was not to be tolerated within the city. The informer was also to pay into the public treasury a fine of 1,000 gold maravedis (Kayserling, "Gesch. der Juden in Spanien," i. 76 *et seq.*, 206 *et seq.*). The execution of a death-sentence pronounced by a Jewish court could take place only with the king's consent and through the royal alguazil (hangman).

The execution of Joseph PICHON (receiver-general of taxes, who was accused of being an informer), for which the sanction of King John I. of Castile had been obtained on his coronation-day, Aug. 21, 1379, was of incalculable importance for the Jews of Spain, and was the main reason why the Jews of Castile were deprived of jurisdiction in criminal cases. The measure passed in 1363, which remained in force for only a few decades, did not contribute much toward frightening informers. On the contrary, they multiplied to such an extent that in the statutes adopted at the meeting of communal representatives convened by the court rabbi Abraham Benveniste at Valladolid in May, 1432, a whole chapter was devoted to informers.

It was due to Benveniste, who stood in high favor with the then all-powerful Alvaro de Luna, that King John II. again conceded to the Jews the right to decide criminal cases. In the last-mentioned statutes it was stipulated that each case of talebearing through which a Jew or a Jewess might have suffered injury was to be punished with ten days' imprisonment and a fine of 100 maravedis, if no Christian was present when the delation took place. The fine was to be doubled if the crime had been committed in the presence of a Christian. When one was convicted of informing, he was branded on the forehead with a red-hot iron; if he were convicted of treason three times on the testimony of two trustworthy witnesses, the court rabbi was required to bring about his execution at the hands of the royal alguazil. Did the informer escape, so that he could be neither killed nor branded, he was proclaimed in all places as a traitor, completely excommunicated from the community of Israel, and stigmatized as "blood-shedder" or "villain" (see the statute in "Jahrbuch für die Gesch. der Juden und des Judenthums," iv. 307). In northern Africa, as in Castile, the law was visited upon informers in all its severity. Simon ben Zemah Duran and his son Solomon passed sentence of death unhesitatingly upon moserim.

Jurisdiction over Informers.

Worse than in Spain were the conditions in German countries, where the governments protected the informers. The expulsion of the Jews from Augsburg, Nuremberg, and Ratisbon, and the persecutions in Posen, Frankfort-on-the-Main, and Worms

In Germany.

are traceable to informers. A certain Hirschel Meyer, through his denunciations, caused his coreligionists much trouble previous to their expulsion from Vienna in 1670.

The practise of giving malicious information lasted longest in Poland, where moserim, with the approval of the government, were punished by having the tongue or ears cut off. In Posen a Jewish informer is said to have been sentenced to death, in accordance with the verdict of a Jewish court, so late as the last decades of the eighteenth century (Perles, "Gesch. der Juden in Posen," in "Monatsschrift," xiv. 166). The informer who escaped punishment was excommunicated; and he then sought refuge in baptism. The number of those who, after baptism, appeared as accusers of their former coreligionists, and who, like Nicolaus Donin, Joshua al-Lorki, and Pfefferkorn, brought unspeakable suffering upon them, is very large.

Bibliography: Kaufmann, *Zur Gesch. des Delatorenwesens* (first published in *J. Q. R.* viii.), in *Alls. Zeit. des Jud.* lxi. 405, 414; Kayserling, *Das Casti'ianische Gemeindestatut*, in *Jahrbuch für die Geschichte der Juden*, iv. 272; Hamburger, *R. B. T.* iii., Supplement, p. 8.

M. K.

MOSER, MOSES: German merchant known as a friend of Heine; born 1796; died at Berlin Aug. 15, 1838. He was educated for a business career, and was for a time an assistant of the banker Moses Friedländer in Berlin. Afterward he became the confidential cashier of Moritz Robert there. Moser had considerable mathematical talent, and he also studied philology. With Gans and Zunz he helped to found the Verein für Kultur und Wissenschaft des Judenthums. He thus became friendly with Heine, who had a high opinion of his ability and character, and called him "a living appendix to Nathan der Weise." Many of Heine's most intimate letters were addressed to Moser, who was his closest friend up to the year 1830.

Bibliography: G. Karpeles, *Heinrich Heine, Aus Seinem Leben und Seiner Zeit*, pp. 66 *et seq.*

J.

MOSES.—Biblical Data: The birth of Moses occurred at a time when Pharaoh had commanded that all male children born to Hebrew captives should be thrown into the Nile (Ex. ii., comp. i.). Jochebed, the wife of the Levite Amram, bore a son, and kept the child concealed for three months. When she could keep him hidden no longer, rather than deliver him to death she set him adrift on the Nile in an ark of bulrushes. The daughter of Pharaoh, coming opportunely to the river to bathe, discovered the babe, was attracted to him, adopted him as her son, and named him "Moses." Thus it came about that the future deliverer of Israel was reared as the son of an Egyptian princess (Ex. ii. 1-10).

When Moses was grown to manhood, he went one day to see how it fared with his brethren, bondslaves in the Egyptians. Seeing an Egyptian maltreating a Hebrew, he killed the Egyptian and hid his body in the sand, supposing that no one who would be disposed to reveal the matter knew of it. The next day, seeing two Hebrews quarreling, he endeavored to separate them, whereupon the Hebrew who was wronging his brother taunted Moses with slaying the Egyptian. Moses soon discovered from a higher source that the affair was known, and that Pharaoh was likely to put him to death for it. He therefore made his escape to the Sinaitic Peninsula, and settled with Hobab, or Jethro, priest of Midian, whose daughter Zipporah he in due time married. There he sojourned forty years, following the occupation of a shepherd, during which time his son Gershom was born (Ex. ii. 11-22).

One day, as Moses led his flock to Mount Horeb, he saw a bush burning but without being consumed. When he turned aside to look more closely at this marvel, YHWH spoke to him from the bush and commissioned him to return to Egypt and deliver his brethren from their bondage (Ex. iii. 1-10). According to Ex. iii. 13 *et seq.*, it was at this time that the name of YHWH was revealed, though it is frequently used throughout the patriarchal narratives from the second chapter of Genesis on. Armed with this new name and with certain signs which he could give in attestation of his mission, he returned to Egypt (Ex. iv. 1-9, 20). On the way he was met by YHWH, who would have killed him, but Zipporah, Moses' wife, circumcised her son and Yhwh's anger abated (Ex. iv. 24-26). Moses was met and assisted on his arrival in Egypt by his elder brother Aaron, and readily gained a hearing with his oppressed brethren (Ex. iv. 27-31). It was a more difficult matter, however, to persuade Pharaoh to let the Hebrews depart. Indeed, this was not accomplished until, through the agency of Moses, ten plagues had come upon the Egyptians (Ex. vii.-xii.). These plagues culminated in the slaying of the Egyptian first-born (Ex. xii. 29), whereupon such terror seized the Egyptians that they urged the Hebrews to leave.

In the Wilderness.

The children of Israel, with their flocks and herds, started toward the eastern border at the southern part of the Isthmus of Suez. The entire procession moved slowly, and found it necessary to encamp three times before passing the Egyptian frontier at the Bitter Lakes. Meanwhile Pharaoh had repented and was in pursuit of them with a large army (Ex. xiv. 5-9). Shut in between the army and the Red Sea, or the Bitter Lakes which were then connected with it, the Israelites despaired, but YHWH divided the waters of the sea so that they passed safely across; when the Egyptians, tempted to follow, He permitted the waters to return upon them and drown them (Ex. xiv. 10-31). Moses led the Hebrews to Sinai, or Horeb, where Jethro celebrated their coming by a great sacrifice in the presence of Moses, Aaron, and the elders of Israel (Ex. xviii.). At Horeb, or Sinai, YHWH welcomed Moses upon the sacred mountain and talked with him face to face (Ex. xix.). He gave him the Ten Commandments, the Law and entered into a covenant with Israel through him. This covenant bound YHWH to be Israel's God, if Israel would keep His commandments (Ex. xix. *et seq.*).

Moses and the Israelites sojourned at Sinai about a year (comp. Num. x. 11), and Moses had frequent communications from YHWH. As a result of the

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October 18, 1974

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Clerk
U.S. Court of Appeals
for the Second Circuit
Foley Square
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Re: United States v. Richard Huss and Jeffrey Smilow, Nos. 74-2047 and 74-2127

Dear Mr. Fusaro:

Enclosed for filing please find 25 copies of Appellants' Brief on Appeal, along with 10 copies of the Appendix thereto.

Sincerely,

Patricia E. Sheridan

Patricia E. Sheridan
Secretary to Mr. Lewin